

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
 )  
Comcast of Texas, LLC )  
Order Setting Basic Equipment and Installation ) CSB-A-0702  
Rates )  
Arlington TX (TX0826) )

ORDER

Adopted: March 14, 2005

Released: March 16, 2005

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. On February 11, 2004, Comcast of Texas, LLC (“Comcast” or the “Company”), filed an appeal of a Rate Order adopted by the City of Arlington, Texas (“City of Arlington” or the City)<sup>1</sup> on January 27, 2004. The City filed an opposition on March 9, 2004,<sup>2</sup> to which Comcast filed a Reply on March 16, 2004.<sup>3</sup>

<sup>1</sup> Appeal of Local Rate Order (“Appeal”), filed February 11, 2004. The rate order is Ordinance No. 04-017, passed and approved by the City of Arlington TX, on January 27, 2004, ratifying and approving Order issued January 12, 2004, by Charles R. Kiefer, City Manager, City of Arlington. The Ordinance and the Order issued by the City Manager are, respectively, Attachments A and B to the Appeal. We use the term “Rate Order” to refer to both these documents collectively.

The Rate Order refers favorably to two reports by an independent certified public accountant that the City retained to review Comcast’s proposed rates. Appeal, Attachment B at 1. Neither party has made these reports available to us. There are, however, other attachments to the pleadings herein, including correspondence between the accountant and Comcast. Appeal, Attachments D, E, and G. We assume that these accurately describe the rationale for the Rate Order and the arguments that Comcast made before the City.

<sup>2</sup> Opposition to Appeal of Local Rate Order (“Opposition”), filed March 9, 2004. On March 5, 2004, the City filed a Motion for Extension of Time (“Motion”), asking for an extension of time from February 26 to March 9 for the filing of the Opposition. The Motion states that the Appeal was mailed to the wrong address and did not reach the correct one for 12 days, by which time counsel for the City had left the country for a week; and that counsel for Comcast has no objection to the requested extension. Motion at 1-2. Although Commission policy is that motions for extension of time shall not be routinely granted, 47 C.F.R. § 1.46(a), we find that the City has stated good grounds for the extension it requests and, absent objection, we grant the Motion.

<sup>3</sup> Reply to Opposition to Appeal of Local Rate Order (“Reply”), filed March 16, 2004.

2. Comcast's Appeal concerns four alleged deficiencies that the City's Rate Order identified in the Company's Form 1205.<sup>4</sup> In brief, we conclude that the City erred in excluding Comcast's tools costs, but did not err in changing its depreciation rate for converters and remotes, in excluding its converter management costs, or in removing goodwill from its Total Net Assets on Line G4b of the Form 1205. Accordingly, we grant the appeal in part and deny it in part.

## II. BACKGROUND

3. The Communications Act of 1934, as amended ("the Act"),<sup>5</sup> provides that, where effective competition is absent, rates for the Basic Service Tier ("BST") and associated equipment are subject to regulation by franchising authorities.<sup>6</sup> Rates for the BST and equipment should not exceed rates that would be charged by systems facing effective competition, as determined in accordance with Commission regulations for setting rates.<sup>7</sup> If the cable operator fails to meet its burden of proof, has improperly calculated its rates, or is unresponsive to requests for relevant information, the franchising authority may use the "best information available" to review the operator's proposed rates and, if appropriate, adjust them and order refunds.<sup>8</sup>

4. Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.<sup>9</sup> In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as a rational basis for that decision exists.<sup>10</sup> The Commission will reverse a franchising authority's rate decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules. If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.

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<sup>4</sup> Form 1205 is the Commission form that cable operators use to calculate permitted rates for equipment and installation.

<sup>5</sup> 47 U.S.C. §§ 151 *et seq.*

<sup>6</sup> 47 U.S.C. § 543(a)(2).

<sup>7</sup> 47 U.S.C. § 543(b)(1); 47 C.F.R. § 76.922.

<sup>8</sup> 47 C.F.R. § 76.937(d); *Falcon Classic Cable*, 15 FCC Rcd 5717, 5720 (2000) ¶ 10; *Western Reserve Cablevision, Inc.*, 14 FCC Rcd 13391, 13398 (1999) ¶ 12.

<sup>9</sup> 47 U.S.C. § 543(b)(5)(B); 47 C.F.R. § 76.944.

<sup>10</sup> *Harron Commun. Corp.*, 15 FCC Rcd 7901 (2000) ¶ 2; *Implementation of Sections of the Cable Television Consumer Protection & Competition Act*, 8 FCC Rcd 5631 (1993), 9 FCC Rcd 4316, 4346 (1994) ¶ 81.

### III. DISCUSSION

#### A. The Cost of Comcast's Tools.

5. Comcast's first ground for appeal concerns the cost of certain tools it uses for installation and maintenance ("the tools"). The City's consultant implied that, when our current regulation of cable rates began in 1993, the predecessor of Comcast<sup>11</sup> stated that cost on its Form 1240 (or the predecessor to that form).<sup>12</sup> Comcast denies this, alleging that its predecessors have always stated tool expenses on its Form 1205s.<sup>13</sup> Comcast's allegation is supported by a review of its archives and the Form 1205 that its earliest predecessor filed in 1993.<sup>14</sup> The City and Comcast agree, however, that Comcast and its predecessors have stated the cost of the tools on Form 1205 since 1996, and that Comcast did so on its 2003 Form 1205 that led to the Rate Order here under review.<sup>15</sup>

6. The City's consultant stated that Comcast moving the tools' costs from Form 1240 to 1205 in 1996 was an unexplained change from past practice.<sup>16</sup> The consultant acknowledged that including the tools on Form 1205 was, as a general principle, "clearly appropriate,"<sup>17</sup> but recommended that the City not allow Comcast to recover those costs.<sup>18</sup> It appears that the City decided to adopt the recommendation. Comcast appeals from the City's decision, challenging it on the merits and for being untimely.<sup>19</sup>

7. There is no dispute that, at least since 1996, Comcast has stated the costs of the tools in question on its Forms 1205 and has recovered them through installation and equipment charges. The City does not claim that what Comcast is doing is unlawful, contrary to sound accounting, or harmful to subscribers. The City, in essence, is attempting to re-open a 1996 rate form submission by Comcast. Our regulations, however, limit review of these forms to one year.<sup>20</sup> We conclude that the City's ruling on this

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<sup>11</sup> Comcast's predecessors as owner of the Arlington cable system were, starting with the most recent, AT&T, TCI, and Telecable. Appeal, Attachment E (Letter from Robin Pepper, Manager, Rates, Mountain Division, Comcast Cable Commun., Inc., to Alan Cass, Budget/Risk Manager, City of Arlington, dated Dec. 15, 2003) at 3.

<sup>12</sup> Appeal, Attachment D (Independent Accountants' Report, from Philip Vogel & Co. PC to City of Arlington Budget Office, dated May 16, 2003) at 4. Form 1240 concerns rates for the BST, as opposed to Form 1205's focus on equipment and installation. For brevity's sake, when we refer to "Form 1205" and "Form 1240" in this discussion, we include their predecessor Forms.

<sup>13</sup> Appeal, Attachment E, *supra* note 11, at 3. The removal of costs from accounts and Forms related to the BST to accounts and Forms related to equipment and installation is known as "unbundling."

<sup>14</sup> Reply, Exhibits A ("Schedule B" & "SCHEDA.xls") & B (Declaration of Robbin Pepper, Comcast Cable Commun., Inc., at ¶¶ 2-3).

<sup>15</sup> See authorities cited notes 12-13 *supra*; *see also* Appeal, Attachment D, *supra* note 12, at 4.

<sup>16</sup> Appeal, Attachment D, *supra* note 12, at 4.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Appeal at 2-4; Reply at 2-3. The City, in response, avows faith in the judgment of its consultant in general terms. Opposition at 4.

<sup>20</sup> 47 C.F.R. § 76.933 (g)(2). We also reference the equitable defense of laches, which authorizes a court, in its discretion, to bar claims where there is lack of diligence by the party against whom the defense is asserted and prejudice to the party asserting the defense. *Kansas v. Colorado*, 514 U.S. 673, 687 (1995); *Costello v. United States*, 365 U.S. 265, 282 (1961).

issue lacks a supporting explanation and a rational basis. Accordingly, we grant Comcast's appeal on this issue.

## B. Depreciation of Converters and Remotes

8. In its Form 1205, Comcast used a depreciation period of three years for its converters and remotes.<sup>21</sup> The Company and its predecessors apparently used this period since 1999, before which they used a five-year period.<sup>22</sup> The City's consultant recommended that the City impose a five-year period because Comcast had not justified its change, Comcast's own schedules indicate that remotes and converters are still in service for more than three years, and that established depreciation guidelines indicate that the life of the equipment is at least five years.<sup>23</sup> The City adopted the consultant's recommendation.<sup>24</sup>

9. Our recent decision in *Comcast Cable of Dallas, Inc.*, states that a franchising authority should accept a cable operators' proposed depreciation period if it is taken from the cable operators' books, is in accordance with Generally Accepted Accounting Principles ("GAAP"), and reasonably approximates industry standards.<sup>25</sup> In this case, unlike *Comcast Cable of Dallas*, the City's consultant determined from Comcast's own schedules that its "remotes and converters are still in service for periods well in excess of the three-year life they propose."<sup>26</sup> The consultant also apparently referred to industry standards when he stated that "[g]enerally established depreciation guidelines indicate . . . that lives of these assets should be a minimum of five years."<sup>27</sup> Comcast responds with general statements<sup>28</sup> and assumptions.<sup>29</sup>

10. In light of the relatively detailed findings of the consultant in addressing two of the three criteria of our *Comcast Cable of Dallas* decision, we cannot say on the facts of this particular case that the City's Rate Order lacked a rational basis. Nor does the Rate Order questioning a Comcast practice that dates back to 1999 strike us as unjust in this case.<sup>30</sup> Comcast objects that the City's adjustment to its

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<sup>21</sup> Appeal at 4.

<sup>22</sup> *Id.* at 5, quoting Attachment E, *supra* note 11, at 4.

<sup>23</sup> *Id.*, Attachment D, *supra* note 12, at 4; Opposition at 4-5.

<sup>24</sup> Reply at 3.

<sup>25</sup> *Comcast Cable of Dallas, Inc.* 19 FCC Rcd 17421, 17425 (2004) ¶¶ 12-13, citing *TCI of Pennsylvania, Inc.*, 19 FCC Rcd 9454, 9463-64 (2004) ¶¶ 33-34; *TCI of Pennsylvania, Inc.*, 19 FCC Rcd 312, 323 (2004) ¶¶ 37-38; *Tele-Media Co. of Western Connecticut*, 11 FCC Rcd 3161, 3164 (1996) ¶ 13, *reconsideration dismissed*, 13 FCC Rcd 17756 (1998); *Media General Cable of Fredericksburg*, 10 FCC Rcd 9390 (1995) ¶ 5a, *reconsideration granted on other grounds*, 13 FCC Rcd 11103 (1998), 14 FCC Rcd 21295 (1999).

<sup>26</sup> Appeal, Attachment D, *supra* note 12, at 4.

<sup>27</sup> *Id.*

<sup>28</sup> Comcast complains that the City's case lacks specificity (Reply at 4), but the City's presentation on this issue is more detailed and factual than Comcast's.

<sup>29</sup> Reply at 4 ("Assuming *arguendo* [the City's consultant] did have evidence of some remote control units being deployed for longer than three years, . . ."; "Even if there were some differences observed between the Company's predictive depreciation schedule and its actual field experience, . . .").

<sup>30</sup> See *supra* note 20.

depreciation period “threatens to wreak havoc with” the Form 1205 that the Company has developed for nationwide use.<sup>31</sup> Comcast may not, however, effectively prevent franchising authorities from regulating the BST and associated equipment by invoking the convenience of one nationwide regulatory filing. The Act confers regulatory authority on the City of Arlington. The City’s Rate Order stated a rational basis for its ruling on this issue and, accordingly, we deny Comcast’s appeal.

### C. Converter Management Costs

11. In its Form 1205, Comcast stated the cost of managing its inventory of converters as a capital cost rather than as an expense.<sup>32</sup> The City’s consultant recommended that the City not allow Comcast to recover that cost, and the City agreed with its consultant.<sup>33</sup> In the filings on this issue, before both the City and us, Comcast and the consultant trade claims and arguments about several subjects. These include what functions these costs represent,<sup>34</sup> how they should be stated on our Forms and under GAAP (*e.g.*, as capital costs or expenses),<sup>35</sup> and whether Comcast provided enough documentation to satisfy the reasonable curiosity of the City’s consultant that the costs were not being recovered twice from subscribers.<sup>36</sup>

12. Concerning the correct way to state converter management costs, Comcast correctly points out that in *TCI Cablevision of Arcadia/Sierra Madre* (“*Sierra Madre*”), we allowed a cable operator to capitalize the cost of managing an inventory of converters.<sup>37</sup> We stated that “[a]ccording to GAAP, it is proper to capitalize costs incurred in storing or handling goods before they are sold.”<sup>38</sup> The City also correctly points out, however, that Comcast rents the converters involved in the present case to subscribers for long periods, thus retaining ownership, and does not sell them quickly and cease to be their owner.

13. The City’s claim of possible double recovery distinguishes this case from *Sierra Madre*, on which Comcast relies and in which the Commission allowed the capitalization of certain converter inventory management costs. This case more resembles *TCI of Richardson, Inc.*, where the Commission

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<sup>31</sup> Appeal at 5.

<sup>32</sup> Appeal, Attachment D, *supra* note 12, at 4.

<sup>33</sup> Appeal at 6; *id.*, Attachment D, *supra* note 12, at 4; Reply at 5.

<sup>34</sup> See Appeal at 6; Opposition at 5-7 (not part of the cost of initial acquisition of assets to be sold, but costs incurred over the lives of assets that Comcast will rent for years); Reply at 6 (maintenance service centers to store and process converters, and authorizations costs to activate converter operations); see generally Appeal, Attachment E, *supra* note 11, at 5.

<sup>35</sup> See Appeal at 6; Opposition at 5-7; Reply at 6 & n.14; see generally Appeal, Attachment E, *supra* note 11, at 5.

<sup>36</sup> See Appeal at 6-7 (“The Company provided the Consultant all of the detailed subsidiary ledger information from which inventory management costs were derived,” quoting *id.*, Attachment E, *supra* note 11, at 5); Opposition at 5-8 (“Comcast has been unable to provide information which would allow us to verify that such costs are actually capitalized on its books . . . and . . . have not already been included as . . . direct operating expenses,” quoting Appeal, Attachment E, *supra* note 11, at 5); Reply at 5-6; see generally Appeal, Attachment E, *supra* note 11, at 5.

<sup>37</sup> *Sierra Madre*, 11 FCC Rcd 10557, 10561 (1996) ¶ 9.

<sup>38</sup> *Id.*

disallowed the recovery of such expenses in part because the cable operator's records were confused and it could not be shown exactly where the expenses had been recorded.<sup>39</sup>

14. On these and other subjects listed in paragraph 11 above, neither party's presentation is more convincing than the other's. In rate appeals, the cable operator has the burden of proof that the franchising authority's decision lacks a rational basis.<sup>40</sup> Here, Comcast has failed to sustain that burden. For example, Comcast could have provided us with convincing detail about what information it made available to the City's consultant. On the record before us, we are unable to conclude that the City's Rate Order lacked a rational basis. Accordingly, we deny Comcast's appeal on this issue.

#### **D. Removal of Goodwill from Total Net Assets**

15. An initial part of the rate-setting process is for the cable operator to state its "ratebase," which for purposes of this issue is the capital cost of its equipment and plant that is used and useful for the installation and maintenance of the BST. The cable operator does this on Form 1205, Line G4b, which is entitled "Total Net Assets." The Instructions for Form 1205 direct the cable operator: "Enter here the value of your total net assets."<sup>41</sup>

16. The sum which Comcast stated on Line G4b as its total net assets included its "costs of goodwill."<sup>42</sup> The City's consultant recommended that the goodwill costs be deducted from Total Net Assets. The consultant stated that "goodwill is presumptively disallowed from the ratebase in cost of service showings because it is likely to represent expectations of profits and other outlays that should not be borne by regulated service customers."<sup>43</sup> Therefore, according to the consultant, to include goodwill would lead to an overstatement of Comcast's ratebase and, therefore, its profit.<sup>44</sup> The City agreed with its consultant.<sup>45</sup>

17. Comcast points out that the Instructions for Form 1205 do not explicitly exclude goodwill.<sup>46</sup> It claims that the City's exclusion of goodwill on Line G4b "creates a mathematical mismatch" with Line G4a, which calls for actual interest payments without any exclusions.<sup>47</sup> Finally, Comcast states that the

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<sup>39</sup> *TCI of Richardson, Inc.*, 13 FCC Rcd 21690, 21695-96 (1998) ¶ 14 & n.40.

<sup>40</sup> 47 C.F.R. § 76.937; *see also* ¶ 4 *supra*. Also, the franchising authority is entitled to see information that is material and relevant. *See* 47 C.F.R. § 76.938.

<sup>41</sup> FCC Forms, 1205, *Instructions for Determining Costs of Regulated Cable Equipment & Installation*, <http://www.fcc.gov/formpage.html> (visited Dec. 14, 2004).

<sup>42</sup> *See* Appeal at 7; Appeal, Attachment D, *supra* note 12, 5.

<sup>43</sup> Appeal, Attachment D, *supra* note 12, at 5.

<sup>44</sup> *Id.*

<sup>45</sup> Opposition at 8.

<sup>46</sup> Appeal at 7-8.

<sup>47</sup> *Id.* at 8 n.20.

purpose of Line G4b is not to determine Comcast's ratebase (in which event excluding goodwill might be reasonable), but to determine its interest deductibility factor.<sup>48</sup>

18. Comcast is correct that the Form 1205 Instructions do not require the exclusion of goodwill. That is irrelevant, however, because the Instructions need not address every issue that may arise in completing the Form. Excessive amounts of equipment and plant should not be stated on Line G4b even though the Instructions do not explicitly call for their exclusion. Comcast is likewise correct that Line G4a does not, on its face, require exclusions from Comcast's actual interest payments. Again, however, we do not doubt that, if Comcast were found to have paid excessive interest, those payments could be disallowed. Finally, Comcast has not explained why the fact that the sum stated on Line G4b helps calculate an interest deductibility factor rather than a ratebase should include goodwill in the former but exclude it from the latter. Ratebase-rate-of-return regulation generally includes only the reasonable costs of providing service in a competitive market. It excludes goodwill because goodwill represents expectations of supra-competitive profits.<sup>49</sup> Comcast has advanced no reason why the City's Rate Order, in applying this principle to Line G4b, lacked a rational basis. Accordingly, we deny Comcast's appeal on this issue.

#### IV. ORDERING CLAUSES

19. Accordingly, **IT IS ORDERED** that the Appeal filed by Comcast of Texas, Inc., in CSB-A-0702, **IS GRANTED IN PART AND DISMISSED IN PART** and **IS REMANDED** for further consideration consistent with this Order.

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<sup>48</sup> Appeal at 9, quoting *id.*, Attachment E, *supra* note 11, at 6.

<sup>49</sup> *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 11 FCC Rcd 2220, 2239 (1996) ¶ 42 ("Traditional principles of rate of return regulation prohibit a business from including in its ratebase goodwill or other intangible costs that represent monopoly expectations"); 9 FCC Rcd 4527, 4575 (1994) ¶ 82 ("Traditional principles of ratemaking and the policies embodied in the Cable Act also warrant disallowance of costs that do not represent reasonable costs of providing regulated services to customers, equivalent to the costs that would be incurred under competition. This generally includes acquisition costs recorded as goodwill"), 4575-76 at ¶ 84 ("To balance investors' and ratepayers' interests fairly, we will presumptively allow those types of intangible costs that generally represent reasonable costs of providing service and that would be incurred under competition. We believe that some intangible costs do generally represent costs used and useful in the provision of regulated services, and thus should properly be recovered in rates. Other intangible costs, including goodwill, will be presumptively excluded"), 4582-83 at ¶ 99 ("We conclude that goodwill, including going-concern value, should be presumptively disallowed from the ratebase because it is likely to represent expectations of supra-competitive profits and other outlays that should not be borne by regulated service customers. We believe this approach fairly balances the interests of consumers and investors") (footnote omitted) & n.191 ("Courts have consistently allowed regulatory authorities to exclude goodwill from determination of ratebase. See, e.g., *Gavelston Electric Co. v. Gavelston*, 258 U.S. 388, 396-397 (1922); *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 52 (1909); . . .").

20. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules. 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

John B. Norton  
Deputy Chief, Policy Division, Media Bureau